

Commission

BEFORE THE  
Washington, DC 20554

Federal Communications

In re Comments of

)  
Broadcasting Corporation ) El Mundo  
MM Docket 95-31  
)  
)

To: The Commission

COMMENTS ON REEXAMINATION OF  
THE COMPARATIVE STANDARDS  
FOR NONCOMMERCIAL EDUCATIONAL APPLICANTS

The Only Way to Bring Clarity to the Mixed Group Situation is for the Commission to Adopt a Combination of Option #1 and Option #2

1. The court in NPR v. FCC, 254 F. 3d 226 (D. C. Cir. 2001) found that "nothing in the Act authorizes the Commission to hold auctions for licenses issued to NCEs to operate in the unreserved spectrum." The Commission raises the question of whether all "nonprofit educational organizations" are exempt from auctions whenever they apply for any broadcast license because of the nature of the NCE organization, or only when they make a showing that the station will be used for the advancement of an educational program or service. The Congress gave little guidance on this question but it appears that the reason the Congress exempted NCEs from auction is because it was concerned that such organizations would be at a bidding disadvantage vis-a-vis commercial entities. If it is the nature of the NCE organization that is determinative and an NCE files on an unreserved channel, an auction would be prevented and the Commission would be faced with developing a method of

comparing commercial applicants and NCE applicants in order to award licenses.

2. Rather than attempt to decide whether it is the nature of the entity or the format that is determinative, the Commission should adopt a combination of Option #1 and Option # 2. It should conclude that NCE entities are ineligible for licenses for unreserved channels and frequencies. But, instead of the proposal in Option #2 of opening a filing window for both NCE and commercial entities, the Commission should only invite the filing of NCE applications when a particular unreserved channel has been added to the Table of Allotments, a window has been opened, and no application for the channel has been filed by commercial entities.

3. Since new unreserved FM and TV channels are added to the Table of Allotments as the result of a Petition for Rulemaking, the proponent of the channel will in most cases file an application in response to a filing window. There are few cases in which there are not multiple competing applications, but in those cases where there are no commercial applications, applications by NCEs for the unreserved channel would be accepted.

If under these circumstances a commercial license is awarded to an NCE, and, in the future the NCE organization decided to sell the facility, it could sell to either a commercial or NCE entity. The unreserved nature of the channel would be maintained.

4. Currently, NCEs know that when they file for a reserved channel and competing applications are also filed that their application will be judged under the established point system. Competing commercial entities filing for unreserved channels know that their applications will be subjected to an auction. As a result of the decision in *NPR v. FCC*, and in the absence of adoption of Option 1, commercial applicants for

unreserved channels will

not know whether a license will be awarded as the result of an auction  
or  
whether they will

face a new comparative system for awarding licenses in mixed groups.

5. Since the decision in *NPR v. FCC*, the presence of a single  
NCE

application

in competition with commercial entities: (1) prevents an auction from  
being  
held thereby

frustrating the intent of the 1997 Budget Act, (2) requires the  
formulation

of new comparative

procedures for awarding licenses, and (3) inevitably creates delay.

6. The Commission should adopt rules which incorporate Option #1  
and  
the

foregoing variation of Option #2. This would create procedures which  
provide clear guidance

as to the treatment that will be accorded to competing applications  
for  
unreserved channels.

Adopting this approach would have the desired clarity and simplicity,  
but  
would provide

NCEs an additional but limited opportunity to file for an unreserved  
channel.

The Policy of Permitting Defective NCE

Applications to Remain on File in Order to

Increase the Potential Pool of Applicants Should be Eliminated

7. In footnote 40 of the Second Further *NPR*, the Commission  
states  
that "there

are pending 31 'mixed groups' (i.e., mutually exclusive commercial and  
NCE  
applicants for

non-reserved FM channels". Included in some of these groups are  
applications which are

patently defective. The Commission policy has been to not dismiss  
defective applications

(including untimely applications) but to permit them to remain on file.

There are two reasons

for the policy. First, it is argued that it is a waste of staff  
resources

to review all of the

pending applications since only one will prevail at auction, and,  
second

allowing the entities

with defective applications to participate in auctions increases the  
pool  
of bidders.

Apparently, if an entity with a defective application is the highest  
bidder

at the auction, the

Commission will allow the submission of post-auction amendments which

seek  
to remove the  
defect.

8. It is submitted that the retention of flawed applications cannot be justified by an interest in enlarging the pool of bidders, especially now that the NPR decision has eliminated the bidding pool justification as far as NCE entities are concerned. Since they cannot be compelled to participate in an auction, there is no justification for allowing these defective NCE applications to remain on file. Any pending defective applications should be dismissed.

9. The following is a specific example on one mixed group of the impact of the policy of not reviewing competing applications and dismissing those with fatal defects. There are five competing applications for unreserved channel 251A at Santa Isabele are no commercial applications, Isabel, Puerto Rico, which was allotted as part of MM Docket No. 91-259. One of the five applications is an NCE application. In that same docket, WUKQ(FM), Mayaguez, Puerto Rico was ordered to change channel from 256B to 254B. However, Channel 254B is co-channel

with a station in Culebras, Puerto Rico, and for that reason, in April 1999, El Mundo Broadcasting Corporation, licensee of station WUKQ(FM) filed a one-step application=20

requesting a change in proposed channel from 254B to 253B. In the WUKQ application, the consulting engineer pointed out that two of the five pending Santa Isabel applications are fatally flawed because one is untimely and both are short-spaced to the WUKQ allotment on Channel 254B and to the application proposal for Channel 253B. There is no problem with the other three commercial applications. The single NCE application in the group, filed by New Impact Educational Broadcasting Group, File No. BPH-19950908MC, is one of the two

defective

applications. The New Impact application is not only short-spaced to the

WUKQ allotment

of Channel 254B by 5 km under sections 73.207 and 73.215(e), but it was

filed one day past

the close of the Santa Isabel filing window deadline. The consulting engineer pointed out that

there is a notation in the Commission database that this application was

"untimely filed". The

application should have been dismissed but has been kept on file.

The

other short-spaced

application, File No. BPH-19950907MC, is a commercial application which is

also short-

spaced by 10 km under Section 73.207 and Section 73.215(e). If the fatally

flawed NCE

application had been reviewed and properly dismissed for being short-spaced

and untimely,

the four remaining commercial applications could have proceeded to auction.

If both fatally

flawed applications had been dismissed, the pending WUKQ application could

have been

granted and the other three unflawed commercial applications could have

proceeded to

auction. It is submitted that both of the flawed applications should have

been dismissed but

it is the presence of the defective NCE application which has prevented

this group from

moving to auction. The other Santa Isabel applicants are being held hostage to a single

defective NCE application. The WUKQ minor change application is being held

hostage to

two defective applications. The Commission should revise the policy of not

reviewing NCE

applications (and commercial applications) for fatal defects and should

order the dismissal of

flawed applications as part of its effort to speed processing of pending

applications and to

clear up the backlog of mixed group applications.

Respectfully

submitted,

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